

**STATE OF MICHIGAN
IN THE SUPREME COURT**

**Appeal from the Court of Appeals
Donald S. Owens, Presiding Judge**

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellant,

-vs-

FREDERICK GOTTSCHALK and
JEFFREY SILAGY

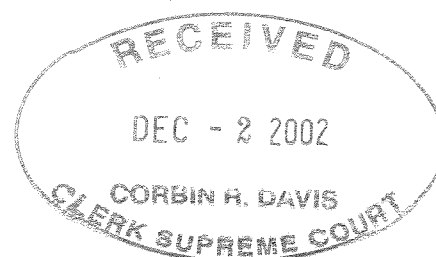
Defendants-Appellees,

Supreme Court Nos.:
121833 & 121834

BRIEF ON APPEAL – APPELLANT

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

INDEX OF AUTHORITIES	ii
QUESTION PRESENTED FOR REVIEW	iii
STATEMENT OR APPEAL.....	iv
STATEMENT OF FACTS AND PROCEEDINGS.....	1
ARGUMENT	5
The Special Prosecutor, appointed by reason of a conflict of interest on the part of the county prosecutor, upon the request of the county prosecutor, is authorized to investigate and bring charges against a defendant under MCL 49.160	5
RELIEF REQUESTED.....	13

INDEX OF AUTHORITIES

Cases

<i>Genesee Prosecutor v Circuit Judge</i> , 386 Mich 672 (1972).....	9
<i>In re Petition for Appointment of Special Prosecutor</i> , 122 Mich App 632 (1983).....	6
<i>People v Davis</i> , 86 Mich App 514 (1978).....	9
<i>People v Herrick</i> , 216 Mich App 594 (1996).....	7
<i>Sayles v Circuit Judge</i> , 82 Mich 84 (1890).....	9

Statutes

MCL 14.28	11
MCL 49.160	11
MCL 752.11	1, 10
MCL 750.157a.....	2
MCL 750.505	2
MCL 776.18	1, 3, 5, 6

Public Acts

1978 PA 535	7
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QUESTION PRESENTED FOR REVIEW

IS THE SPECIAL PROSECUTOR, APPOINTED BY REASON OF A CONFLICT OF INTEREST ON THE PART OF THE COUNTY PROSECUTOR, UPON THE REQUEST OF THE COUNTY PROSECUTOR, AUTHORIZED TO INVESTIGATE AND BRING CHARGES AGAINST A DEFENDANT UNDER MCL 49.160?

STATEMENT OF APPEAL

Plaintiff-Appellant, State of Michigan, by and through the Special Prosecutor appeals the decision of the Court of Appeals in the consolidated cases of People of the State of Michigan v Fred Gottschalk, No. 237681, and People of the State of Michigan v Jeffrey Silagy, No 237682, dated June 18, 2002. Plaintiff-Appellant asks this Honorable Court to reverse the decision of the Court of Appeals, affirm the decision of the Circuit Court and remand this case to the Circuit Court for trial on the charges filed.

STATEMENT OF FACTS AND PROCEEDINGS

The Special Prosecutor was appointed pursuant to a Petition filed by the Iosco County Prosecutor, Gary Rapp on February 10, 2000.(Appendix 144a) This Petition was supported by an Affidavit executed on February 17, 2000. (Appendix 146a) In essence, the request was made to appoint a Special Prosecutor to review a Complaint filed with the State Police by Steven Freund seeking to charge Jeffrey Silagy with perjury for instituting a misdemeanor action against Freund. After reviewing the State Police investigation, Rapp decided against filing a perjury charge. He was then provided further information by Freund which led him to “conduct research to determine if there would be a possibility of criminal charges based upon the allegations of Steven Freund.” He found a statute “regarding a possible/viable charge, that being MCLA 752.11.”

Rapp requested that a special prosecutor be appointed to “review this Complaint [referring to the State Police Complaint], make a determination as to whether a warrant should be issued and to serve in the capacity as special prosecutor throughout the pendency of this case only.”

On March 2, 2000, 23rd Circuit Court Judge J. Richard Ernst entered an Order appointing attorney Maureen Holahan as a Special Prosecuting Attorney.

The Order (Appendix 148a) provides:

“ . . . Maureen Holahan is appointed pursuant to MCLA 776.18, as Special Prosecuting Attorney for the County of Iosco, State of Michigan, to serve in the capacity of reviewing the incident report referred to in the attached Petition, making a determination whether a warrant should be issued and to serve during the pendency of that case only.”

After being appointed Special Prosecutor, Ms. Holahan conducted significant investigation (particularly of documents not obtained by the State Police investigator),

researched the law and determined that charges would lie against the Defendants under both Conspiracy (MCL 750.157a) and Common Law Obstruction of Justice (MCL 750.505).

Both Defendants were arraigned in the 81st Judicial District.

Thereafter, Defendants filed a number of motions and briefs.

The first was a Motion (with Brief in Support) to Quash Complaint and Warrant. The Prosecution filed a response.

The second was a Motion to Dismiss on the theory that the Defendants were immune from prosecution. The prosecution filed a response to this motion as well. The Defendants filed a Brief in Response to the Prosecution's Answer to the Motion to Dismiss and Answer to Motion to Quash.

These Motions were argued fully before District Judge Yenior on August 18, 2000 and denied. The Order Denying Motion to Dismiss and Motion to Quash Complaint & Warrant was entered on August 22, 2000, (Appendix 7a).. No appeal was filed or attempted from this order.

Thereafter, a Preliminary Examination was scheduled to take place on October 24, 2000.

The Defendants then filed a Second Motion to Dismiss dealing principally with legal issues surrounding the common law charges. The Prosecution filed an Answer and Brief in Response to this motion. The Motion was to be argued on October 24, 2000.

The Attorney General of the State of Michigan then filed a Motion to Intervene and Assume Prosecution Jurisdiction on Friday, October 20, 2000, (Appendix 9a) which was scheduled for argument on Tuesday, October 24, 2000. An Answer and Brief in Opposition to this Motion were filed by the Prosecutor on Monday, October 23, 2000.(Appendix 23a) While the Attorney General's Motion argued many issues, one of them was, in essence, the question of whether the Special Prosecutor had the authority to bring the charges against the Defendants.

All attorneys appeared to argue the motions scheduled on the morning of October 24. The Attorney General's Motion went first. The Attorney General argued (in the person of Robert Ianni) that the Special Prosecutor would have been improperly appointed under MCL 776.18 and should have been considered under MCL 49.160 since the county prosecutor had been disqualified by reason of a conflict of interest. Oral arguments were heard, and during them, the Attorney General asked for permission to file a supplemental brief on the issue and the Court granted him permission, allowing the Special Prosecutor to respond. The other motion, filed by Defendants Gottschalk and Silagy, was adjourned without date, as was the Preliminary Examination.

Further briefs were filed, concentrating on the issues of whether the Special Prosecutor could properly bring charges in this case, the Constitutional separation of powers issue and the matter of intervention and assumption of the prosecution by the Attorney General. (Appendix 35a, 96a)

The District Judge's Opinion and Order (Appendix 138a) was issued November 14, 2000, finding that the intent of the Order appointing Ms. Holahan was to appoint her under MCL 49.160 and that under that statute, "Ms. Holahan has authority to authorize charges as special prosecutor." No appeal was taken or attempted from this Opinion and Order.

Both the Defense and Prosecution filed additional briefs on the issues raised in Defendants' Second Motion to Dismiss, which was denied at the Status Conference held on January 30, 2001 (Appendix 140a)

A Preliminary Examination was held on April 20, 2001. After reviewing the testimony, exhibits and depositions entered into evidence in the case, the District Judge entered an Opinion

and Order on May 9, 2001, binding Defendants Gottschalk and Silagy over to the Circuit Court. (Appendix 142a)

Defendants were bound over on Counts 1 and 4 of the original information and arraigned in Circuit Court on May 21, 2001. On that date an Amended Information was filed reflecting the elimination of Counts 2 and 3 from the original Information and renumbering the remaining two Counts.

Defendants then filed in Circuit Court a reiteration of their original motion in District Court, a Motion to Dismiss Unlawful Prosecution and a Motion to Quash, which were argued on June 18, 2001 and denied by Circuit Judge J. Richard Ernst in an Opinion and Order dated October 23, 2001. (Appendix 1a)

Thereafter, the Defendants-Appellants sought Leave to Appeal, which was granted January 3, 2002. The Attorney General sought and was granted leave to intervene and file an *Amicus Curiae* brief on behalf of the Defendants. The Special Prosecutor sought and was granted leave to file a responsive brief. Oral argument was held on June 11, 2002. The Court of Appeals issued its Opinion reversing the trial court on June 18, 2002. (Appendix 4a)

It was from that Opinion that the Special Prosecutor sought leave to appeal.

Leave to Appeal was granted by the Supreme Court on October 30, 2002.

ARGUMENT

THE SPECIAL PROSECUTOR, APPOINTED BY REASON OF A CONFLICT OF INTEREST ON THE PART OF THE COUNTY PROSECUTOR, UPON THE REQUEST OF THE COUNTY PROSECUTOR, IS AUTHORIZED TO INVESTIGATE AND BRING CHARGES AGAINST A DEFENDANT UNDER MCL 49.160.

All parties, including the District Court, Circuit Court and Court of Appeals seem to agree that the Order reciting the appointment of a Special Prosecutor should have recited the statute MCL 49.160 as authority rather than MCL 776.18.

MCL 49.160, states:

Special prosecuting attorney; appointment; duties.

Sec. 60. (1) If the prosecuting attorney of a county is disqualified by reason of conflict of interest or is otherwise unable to attend to the duties of the office, the supreme court, the court of appeals or the circuit court for that county, upon a finding to that effect by the court, may appoint an attorney at law as a special prosecuting attorney to perform the duties of the prosecuting attorney in the respective court in any matter in which the prosecuting attorney is disqualified or until such time as the prosecuting attorney is able to serve.

Appointment by circuit court. (2) If the prosecuting attorney of a county is disqualified by reason of conflict of interest or is otherwise unable to attend to the duties of the office, the circuit court for that county, upon a finding to that effect by the court, may appoint an attorney at law as a special prosecuting attorney to perform the duties of the prosecuting attorney in the probate court, the district court, or any other court within the county in any matter in which the prosecuting attorney is disqualified or until such time as the prosecuting attorney is able to serve.

Powers; duration. (3) A special prosecuting attorney appointed under this section is vested with all of the powers of the prosecuting attorney for the purposes of the appointment and during the period of appointment.

Inapplicability of section. (4) This section shall not apply if an assistant prosecuting attorney has been or can be appointed by the prosecuting attorney pursuant to section 18 of chapter 16 of Act No. 175 of the Public Acts of 1927, being section 776.18 of the Michigan Compiled Laws, to perform the necessary duties with the constraints of that section or if an assistant prosecuting attorney has been otherwise appointed by the prosecuting attorney pursuant to law and is not disqualified from acting in place of the prosecuting attorney.

MCL 49.160 is clear and unambiguous. If an assistant prosecutor can be appointed under MCL 776.18, it should be done. [Section (4)] If, by reason of the circumstances of the case, MCL 776.18 cannot be used, a court may appoint a special prosecutor. [Section (1)]. If a circuit court determines that the county prosecutor cannot act, the court may appoint an attorney to act as a special prosecutor until the county prosecutor is able to serve. [Section (4)]. The special prosecutor has all of the powers of the prosecutor for the purposes of the appointment and during the period of the appointment. [Section (3)].

The Court of Appeals, held, in essence, that Section (3) does not mean what it says, and that a special prosecutor cannot bring charges in the same way a county prosecutor can. The Court relied on *In re Petition for Appointment of Special Prosecutor*, 122 Mich App 632; 332 NW2d 550 (1983) in support of that proposition. They misread the case. In that action, a county prosecutor conducted an investigation of a shooting, held an inquest, and determined that he would not bring charges against the police involved. A group of citizens, not happy with the decision of the prosecutor, went to the circuit judge to ask for the appointment of a special prosecutor. The circuit judge declined their request, finding that it had no jurisdiction under the circumstances involved to make such an appointment. The Court of Appeals agreed. In that case, there was no request by the prosecutor for the appointment of a special prosecutor, no showing of conflict of interest, no other special circumstance as required by Section (1) of MCL 49.160 requiring the intervention of the circuit court. The case was correctly decided, but does not apply to the facts here.

It is interesting to note, that having decided the only question before the court of appeals, whether the circuit court was correct in **not** appointing a special prosecutor, the court of appeals

went on to discuss what authority a hypothetical special prosecutor might have, if appointed. This entire discussion is *dicta*, not binding on this case or the court of appeals in our case.

In our situation, the county prosecutor specifically determined that criminal charges might lie, but asked for the appointment of a special prosecutor because he was a witness to some of the acts complained of. When that petition was granted the special prosecutor was "vested with all of the powers of the prosecuting attorney for the purposes of the appointment and during the period of appointment."

To adopt the decision of the Court of Appeals, that a special prosecutor cannot bring charges, is to ignore the language of the statute. Under the predecessor statute, arguments had arisen as to whether a special prosecutor had the intrinsic power to bring charges. The statute was amended by 1978 PA 535, which took effect on December 21, 1978. The amendment clarified the issue and specifically declared that the special prosecutor was "vested with all of the powers of the prosecuting attorney".

That does not mean that any judge, any time, or for any reason can appoint a special prosecutor if he is not happy with a charging decision of the county prosecutor. The rest of the statute must be met.

An example of a judge improperly appointing a special prosecutor is discussed in *People v Herrick*, 216 Mich App 594 (1996), a case cited by the Court in its Opinion. In that case, a complainant wanted to press charges against the defendant for allegedly aiding and abetting the sending of a death threat. The county prosecutor investigated the case and decided against bringing charges. The complainant was not satisfied with that decision and, as in *In re Special Prosecutor, supra*, went to the circuit judge and requested the appointment of a special prosecutor. In this case, the circuit court agreed to do so. The defendant in *Herrick* appealed the

trial court on the ground that the trial court erred as a matter of law in ruling that the prosecutor's decision not to prosecute constitutes a conflict of interest authorizing the appointment of a special prosecutor. The court of appeals agreed. The trial court had also ruled that the fact the complainants had acquired a citizen's warrant authorized the appointment. The court of appeals disagreed, noting that the statute provided the only authority for the court's appointment of a special prosecutor which did not include the appointment because a prosecutor declined to prosecute an action.

The third issue raised in that case was that the case could be continued by the Attorney General. The issue was not before the court and not ruled upon by the Court of Appeals.

Herrick, like *In re Special Prosecutor* were correctly decided on its facts, but again, has no application here. In our case, the county prosecutor **sought** the appointment of a special prosecutor specifically because he felt criminal charges might be warranted, but because of the facts, he had a conflict of interest. The circuit court in our case was not **disregarding the decision of the county prosecutor, it was implementing it.**

The Court's Opinion seems to say that the Constitution prohibits the appointment of Special Prosecutors on the basis of separation of powers. The claim here is that because a judge, member of the judicial branch of government appoints the Special Prosecutor, this is an unwarranted interference with the executive branch.

That might be the case if the appointing judge attempted to involve himself in the decision of whether or not to prosecute an accused. The appointment process itself does not violate the Constitution, either State or Federal. There are a number of cases dealing with the appointment of special prosecutors, which, if studied, do not support the proposition that the Court of Appeals stated.

The case of *Genesee Prosecutor v Circuit Judge*, 386 Mich 672 (1972) involved a situation where a judge decided to amend an information and charge a defendant with a higher crime than that charged by the prosecutor. The prosecutor objected to the amendment. The Michigan Supreme Court determined that the trial judge had improperly interfered in the prosecutorial function and sent the case back for proceedings on the prosecutor's original charge. That question is not involved in this case.

The case of *People v Davis*, 86 Mich App 514 (1978) involved a prosecutor appointed under MCL 49.160 prior to its amendment. The statute changed since the case was decided. It should be noted, however, that the Court of Appeals determined that even though the appointment was flawed, the charges should not be thrown out, but should be continued by the attorney general.

Sayles v Circuit Judge, 82 Mich 84 (1890) was a case involving the appointment of a special prosecutor under the predecessor statute to MCL 49.160. In that case the circuit judge appointed a prosecutor to act in a justice of the peace court. Since the elected prosecutor was only allowed to appear and prosecute complaints before the magistrate when the magistrate requested it, the circuit judge did not have the power to appoint a special prosecutor where the elected prosecutor did not have the power to act. Justice of the peace courts no longer exist in the state. The case does not apply to the facts in this case, not only because it does not deal with the statute involved, but also because of the changes in the statute and the court system since 1890.

For these reasons the Circuit Judge was correct in his decision not to dismiss the charges against the Defendants.

Nothing in the Order Authorizing Appointment of Special Prosecutor limits the Special Prosecutor's ability to determine what, if any, charges should be filed, and against whom.

It is clear, reading the Petition filed by Gary W. Rapp that after deciding an action for Perjury would not lie against Defendant Jeff Silagy, he was provided further information by Steven Freund which showed that the DEQ was in possession of information showing that William Freund, not Steven Freund filled the property at issue. Had this information been given to Rapp initially, no Special Prosecutor (Schantz) would have been needed because there would have been no conflict of interest. Steven Freund, not William Freund, was the contractor with whom Rapp was dealing.

Upon becoming aware of this additional information, Rapp made an initial determination that there was a "possible/viable charge, that being MCLA 752.11." At this point, the conflict situation arose again, not only because of the contractor relationship, but because of the potential that he might be a witness regarding conversations he had with Jeff Silagy. He did not do an exhaustive search of the viability of that possible charge and did not request that any prosecution be limited to the bringing of a charge which would not succeed.

His request was that he be allowed to "procure the assistance and appointment of an individual to serve as Special Prosecutor for Iosco County, State of Michigan, to review this complaint, make a determination as to whether a warrant should be issued and to serve in the capacity as Special Prosecutor throughout the pendency of this case only."

To adopt the position of the Court of Appeals here is to violate all rules of statutory construction and common sense.

Assume, hypothetically, that someone punches an elected county prosecutor in the nose. The prosecutor decides that criminal charges are warranted. He determines that he has a conflict of

interest -- he is the victim and a witness. He is in charge of all of his assistant prosecutors. Therefore, his entire office cannot participate in the prosecution. He goes to the circuit judge to ask for the appointment of a special prosecutor. The special prosecutor investigates the case and determines that assault and battery charges lie. To accept the holding of the Court of Appeals would mean that the special prosecutor could not bring those charges because the county prosecutor did not bring them. However, if the county prosecutor had attempted to bring them, he would have been acting improperly because of his conflict. In other words, no charges could ever be brought against a defendant when a conflict occurs before an action is commenced. If a conflict arose after the commencement of an action, the Court of Appeals seems to concede that a special prosecutor can continue it.

This position leads to the absurd result that the ideal victim for any crime is the prosecutor or his family because nothing can be done to the perpetrator unless the Attorney General decides to intervene.

The statute allowing the appointment of special prosecutors clearly speaks to an interaction between the elected prosecutor and the courts and contains no language which limits the power of a special prosecutor. To the contrary, it vests the special prosecutors with all of the powers of the elected county prosecutors.

This position would mean that the only relief for the complaining witness, Steven Freund, is to go to the attorney general to see if she will bring charges, pursuant to the provisions of MCL 14.28 or MCL 14.30.

In this case, the Attorney General's office was asked on several occasions to become involved when the State was pursuing Steven Freund. Some of those requests were by Mr. Steven Freund and/or his father, William Freund. Mr. Rapp requested the Attorney General's

office to become involved in the initial action which the DNR/DEQ wished to bring against Mr. Steven Freund. The assistant attorney general acknowledged during oral argument held before the district court on October 24, 2000 that his office declined to become involved when the initial perjury complaint by Mr. Steven Freund was being investigated.

The Attorney General's office was involved in the case, however. The Attorney General's office was, until recently, defending one or more civil actions commenced by Mr. Steven Freund against the State of Michigan and/or Mr. Jeff Silagy.

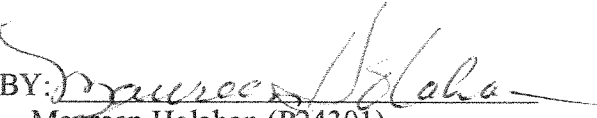
No one has determined if the Attorney General's office or the State of Michigan is paying or has agreed to pay any part of the legal fees incurred in defending this action. The Attorney General's office has footprints all over this file, and at every stage has refused to become involved on behalf of Steven Freund. Now, however, after the defendants were charged, after the preliminary examination, the suggestion is made that Mr. Freund's only recourse is to go to the office which did nothing to protect his rights and has done everything possible to make certain the Defendants do not answer for their crimes. Remember, at the Court of Appeals level, the Attorney General's office intervened on behalf of the Defendants in an effort to kill this case. This is why the Special Prosecutor statutes exist.

The charges against the Defendants Jeff Silagy and Fred Gottschalk are well-founded. The proceedings are clearly constitutional and the appointment of the prosecutor to bring the charges is within the statute. The prosecution should go forward.

RELIEF REQUESTED

WHEREFORE, Plaintiff-Appellant, State of Michigan, by and through the Special Prosecutor prays this Honorable Court reverse the decision of the Court of Appeals in the consolidated cases of People of the State of Michigan v Fred Gottschalk, No. 237681, and People of the State of Michigan v Jeffrey Silagy, No 237682, dated June 18, 2002, affirm the decision of the Circuit Court and remand this case to the Circuit Court for trial on the charges filed.

Respectfully submitted,

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Dated: November 20, 2002

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PROOF OF SERVICE

Maureen Holahan certifies that on November 20, 2002, she provided 2 copies of Plaintiff-Appellant's Brief and Appendix on Appeal to Michael G. Woodworth at the address indicated above and 1 copy of each to Robert Ianni by United Parcel Service.


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